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Date: 3-22-91
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>91-10089</u>
VERNON LEWIS BLACKMON)	
)	
Debtor)	
_____))	
VERNON LEWIS BLACKMON)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>91-1009</u>
MFC FINANCIAL SERVICES)	
)	
Defendant)	

ORDER

Based upon the evidence presented at trial this court makes the following findings of fact and conclusions of law.

On January 16, 1991 the defendant, MFC Financial Services repossessed the debtor's 1986 Jeep Comanche truck.¹ The underlying Chapter 13 petition was filed the next day, January 17, 1991. Debtor gave notice of the filing of his petition and demanded the return of the truck. The defendant refused turnover and retained

the truck until February 14, 1991 when it was finally released to the debtor. In response to the repossession, and initial refusal by the defendant to surrender the vehicle, debtor filed this adversary proceeding on January 18, 1991 seeking

¹The un rebutted testimony of the debtor's spouse establishes that the defendant acting through its agents repossessed the truck in violation of O.C.G.A. 11-9-503. However, a state law cause of action for such violation is not before this court.

turnover of the motor vehicle pursuant to 11 U.S.C. §542 and recovery of damages resulting from an alleged violation of the automatic stay of 11 U.S.C. §362.

The defendant contends that the insurance covering the motor vehicle had lapsed and released the vehicle immediately upon the presentation of proof of insurance, however, the evidence introduced at trial establishes no lapse in coverage. Following repossession through trial of this adversary proceeding the debtor missed time from work of a value of One Hundred Twenty and No/100 (\$120.00) Dollars directly attributable to his efforts to regain possession of the motor vehicle and incurred reasonable attorneys fees of Five Hundred and No/100 (\$500.00) Dollars.

CONCLUSIONS OF LAW

Although the defendant accomplished a prepetition selfhelp repossession, as of the date of the filing of the petition for relief under Chapter 13 the debtor retained a right of redemption under state law (O.C.G.A. §11-9-506 and §10-1-36) which right of redemption constitutes property of the estate and subject to turnover. In re: Saylor, 869 F.2d 1434 (11th Cir. 1989); In re:

Holden, Chpt. 13 case No. 90-11275 (Bankr. S.D. Ga. Aug. Div., Dalis, J. Jan. 11, 1991). Turnover was clearly appropriate and occurred on February 14, 1991. The turnover count of this complaint is moot.

In addition to the turnover, the debtor contends that the retention of the motor vehicle for approximately one month with notice of the Chapter 13 filing constitutes a continuing violation of the automatic stay of 11 U.S.C. §362. In response, the defendant contends that it retained the vehicle because the debtor had allowed his insurance to lapse. The debtor was obligated under his contract to insure the collateral. Upon delivery of a statement of insurance, defendant released the collateral. However, this does not alter the fact that the actions of defendant in refusing to turnover property of the estate to the debtor

upon notice of the Chapter 13 filing, without first obtaining relief from the automatic stay of §362, is a prohibited act of a creditor exercising control over property of the estate. 11 U.S.C. §362(a)(3).

This court has clearly established guidelines for expedited ex parte stay relief under circumstances where a creditor's collateral is uninsured and subject to loss. Bankruptcy Local Rule 5 provides:

Motion for Ex Parte Relief From Stay

(a) Generally. Except in Chapter 11 cases, if collateral securing a claim, including property which is the subject of a lease, is an over-the-road vehicle, such as an automobile, motorcycle, trailer, or a boat or an airplane, and if the same is not insured with full collision and comprehensive insurance, then the holder of such claim may file with the Bankruptcy Court a motion for ex parte relief from the stay of 11 U.S.C. §362(a) pursuant to 11 U.S.C. §362(f) to obtain possession of the collateral or leased property.

(b) Chapter 11 Cases. The Bankruptcy Court may, in its discretion apply this rule to a Chapter 11 case.

(c) Content of Motion. Any motion for ex parte relief from the stay under this rule shall be verified and shall:

(1) Include a description of the collateral or leased property, a statement of the amount of the claim and the basis on which the claim is secured, a statement of the basis on which the moving party believes that the collateral or leased property is not insured with full comprehensive insurance; and a statement that the moving party or its attorney has given or attempted to give oral notice to the debtor's attorney or the debtor, if the debtor is not represented by counsel, that the motion is being filed.

(2) Be accompanied by a proposed order which shall provide that:

(A) The debtor or trustee is prohibited from using the collateral or leased property unless and until adequate evidence of full collision and comprehensive insurance is presented to the holder of the claim;

(B) The debtor or Trustee, whichever is in actual physical possession of the collateral or lease property, shall notify the holder of the claim of the location of the collateral;

(C) The debtor or Trustee, whichever is in actual physical possession of the collateral or leased property, shall surrender it to the holder of the claim within 72

hours of the date of service of the order, unless with in that time (1) the holder of the claim is provided with adequate evidence of full collision and comprehensive insurance or (2) the debtor or Trustee requests a hearing concerning same;

(D) The holder of the claim is authorized to take physical possession of collateral or leased property required to be surrendered under this Rule, and to hold same provided that the holder may not dispose of the collateral or leased property unless and until the automatic stay is modified or terminated or expires as a matter of law and provided that, if the debtor provides adequate evidence of full collision and comprehensive insurance prior to the expiration or termination of the automatic stay, then the holder of the claim must return the property to the debtor; and

(E) The holder of the claim or its attorney shall serve copies of the motion and order promptly on the debtor, the debtor's attorney, and the Trustee, and shall provided telephonic notice to the debtor's attorney and the Trustee, if the Trustee is in actual physical possession of the property.

United States District Court for the Southern District of Georgia Local Rules, Section III, Bankruptcy, Rule 5 (1989).

Defendant in this case ignored this procedure and retained the collateral in violation of 362(a) (3) when turnover was clearly required.

The duty to turnover the property is not contingent upon any predicate violation of the stay, any order of the court, or any demand of the creditor [cite omitted] . . . Rather, the duty arises upon the filing of the bankruptcy petition. The failure to fulfill this duty, regardless of whether the original seizure was lawful, constitutes a prohibited attempt to exercise control over the property of the estate' in violation of the automatic stay.

In re: Knaus, 889 F.2d 773, 775 (8th Cir. 1989)

The defense that defendant was not supplied with adequate proof of continued insurance coverage is totally without merit. Bankruptcy Local Rule 5 sets forth an expedited procedure for determination of adequate insurance coverage. This court determines the adequacy of insurance coverage, not the creditor.

Bankruptcy Code 362(h) provides for the recovery of actual damages including costs and attorney's fees and in appropriate circumstances, the recovery of punitive damages by an individual injured by a willful violation of the 362(a) stay. "Willful", as used in 362(h), means simply acting intentionally or

deliberately knowing of the bankruptcy petition. See Aponte v. Aungst (In re: Aponte) 82 B.R. 738, 742 (Bankr. E.D. Pa. 1988). In this case with full knowledge of the bankruptcy petition, the defendant retained possession of the collateral and refused to deliver same to the debtor. This act was willful as contemplated under §362(h).

The willful actions resulted in injury to the individual debtor. The debtor suffered lost time from employment of a value of One Hundred Twenty and No/100 (\$120.00) Dollars and has incurred reasonable attorneys fees for bringing this action to gain possession of the motor vehicle of Five Hundred and No/100 (\$500.00) Dollars. The individual in this case sustained injury, financial loss, as a result of the willful violation and is therefore entitled

to recover actual damages flowing from that injury which includes reasonable attorneys fees. From the evidence presented a punitive damage award is not warranted.

It is therefore ORDERED that judgment is entered for plaintiff Vernon Lewis Blackmon against defendant MFC Financial Services in the sum of Six Hundred Twenty and No/100 (\$620.00) Dollars together with future interest as provided by law.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 22nd day of March, 1991.